United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1050

To be argued by ALAN J. SOBOL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JOSEPH SCIANNAMEO,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MARSHA KATZ,
CHARLES WEINTRAUB,
Special Attorneys,
Brooklyn Strike Force.

ALAN J. SOBOL,
Attorney,
Department of Justice,
Washington, D. C. 20530.

I N D E X

CITATIONS

Cases:

Cases: Page

Statutes and Rules:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1050

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH SCIANNAMEO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the trial court's questions and comments constituted bias against the appellant.

2. Whether the trial court's question to the defendant requires reversal.

STATUTE INVOLVED

18 U.S.C. §1623. False declarations before grand jury or court

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording,

or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Bartels, J), appellant was convicted of willfully and knowingly making a false declaration under oath before a grand jury in violation of 18 U.S.C. 1623. He was sentenced to a three year term of imprisonment, four months of which to be in confinement and the remainder on probation. The period of confinement was later reduced to three months.

On January 16, 1974 appellant appeared before a United States Grand Jury in the Eastern District of New York. At that time, the grand jury was conducting an investigation of violations of 18 U.S.C. 982, extortionate extensions of credit,and it was a matter material to the grand jury investigation to determine whether the appellant participated in a mutuel policy bet operation, commonly called "numbers", and whether such participation was a financial source for any extortionate extensions of credit business (Tr. 50). In relation to the investigation of said grand jury the appellant answered the questions put to him as follows:

Q. Do you know what a runner is?

A. That runs in the mile track?

Q. In the relation to the gambling business.

A. I don't know the gambling business (Tr. 51).

On June 12, 1974 a superseding indictment was returned against appellant alleging that the aforesaid declaration by appellant before the grand jury, as set forth supra, was false and known by appellant to be false when made (Tr. 10, 51).

Evidence was adduced at trial showing appellant had been an active participant in the gambling business during December 1972, approximately two years prior to his grand jury testimony disclaiming knowledge of the gambling business. The evidence revealed that members of the New York police department conducted a stake-out of Mary's Candy Store at 432A Fourth Avenue in Brooklyn for purpose of ascertaining whether illegal gambling activity was taking place at that location, which was owned by appellant's wife and in which he worked (Tr. 73, 172, 178-179). On December 5, 1972 appellant and another man had a conversation pertaining to the winning "number"[1/] for the previous day

---

1/ "Numbers" is a gambling scheme whereby a person bets on a three-digit number picked at random. The winning number here was taken from the last three digits of the mutuel handle at a racetrack which is published daily in the newspapers (Tr. 64-67).

(Tr. 74, 110-112). On December 15, 1972, pursuant to a search warrant, police conducted a raid on the store at 432A Fourth Avenue in Brooklyn, in which five persons were present including appellant (Tr. 105-106, 117). At the time of the raid appellant was alone in a rear room of the store, sitting in front of a table writing on a slip of paper containing mutuel race horse policy bets (Tr. 75-76, 114-115, 120, 151-153; gov't. exh. 2). The police, pursuant to a warrant, seized it and all the other documents which were on the table at which appellant was seated (Tr. 76).[2/] The seized documents showed not only that appellant was involved in a gambling operation but further that his position was that of a controller or manager. This was evidenced by the volume of bets placed in his possession and the fact that the betting slips he had in his possession came from more than one collector or runner, thus indicating that there was more than one person working for appellant (Tr. 92, 103).[3/]

ARGUMENT

I

THE TRIAL COURT'S CONDUCT, COMMENTS AND RULINGS WERE PROPER

2/ The documents, Government Exhibits 1-7, 9 were introduced as evidence at trial. They consisted of gambling records in the form of mutuel racehorse policy betting slips denoting the names of the bettors, the numbers played and the amount of the bets, football betting slips and a notebook with policy bets and amounts wagered (Tr. 76, 90-104).

3/ The arresting officer testified that the notations on the top of the betting slips, J-5, J-3 were code names for various collectors or runners (Tr. 92, 103).

Appellant contends (Br. 4) that the trial court interferred repeatedly on the behalf of the government and in so doing interjected its own comments to the prejudice of appellant. It is well-settled that a trial judge in a criminal case is more than a mere moderator or umpire and it is his responsibility to provide a fair trial to all parties. Accordingly his discretion in the performance of that duty and management is wide. United States v. McCarthy, 473 F.2d 300, 307-308 (2nd Cir. 1972); United States v. Aguiar, 472 F.2d 553, 555 (9th Cir. 1972). It is also axiomatic that the trial judge has broad discretion in determining and controlling the permissible scope and extent of cross-examination. Alford v. United States, 282 U.S. 687 (1931); United States v. Evanchick, 413 F.2d 950, 953 (2nd Cir. 1969); United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966). Only where the defendant has been denied his right to be fairly tried will a reversal be warranted. United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957).

Here much of appellant's claim of bias relates to the limitation of the cross-examination of the two government witnesses. As noted by this Court in United States v. Pellegrino, 470 F.2d 1205, 1206-1208 (2nd Cir. 1973), cert. den., 411 U.S. 918 (1973), a trial judge's numerous interruptions of defense counsel's cross-examination of the principal government witnesses may properly be prompted by the court's

duty to clarify ambiguous questions and testimony for the jury and to insure that the trial is fairly conducted. Thus where, as here, certain of the interruptions were invited by counsel's admittedly ambiguous and repetitive questions, a new trial is not required where none of the interventions explicitly undercut the defendant's presumption of innocence by implying any belief on the part of the court of defendant's guilt. See also, United States v. Weiss, 491 F.2d 460, 467-469 (2nd Cir. 1974), cert. den., ___ U.S. ___. The trial judge in the instant case had the right and the duty to interject and question the witness so to make certain that the facts were clarified and accurately presented to the jury.

Appellant's first assignment of error (Br. 5-6) clearly reflects the court's interest in clarifying ambiguous testimony, specifically the phrase "old work" (Tr. 124). Also, when counsel for appellant brought up a prior proceeding in which the witness (Officer Doherty) had testified at, it was well within the Court's discretion to clarify exactly which proceeding counsel for appellant was referring to and the parties who were involved. Any claim that appellant was thereby prejudiced when the jury was informed it was appellant's state criminal case was clearly invited. United States v. Pellegrino, supra at 1207.

Moreover, appellant's repeated attempts during trial to make an appealable issue out of the fact that one

year after the arrest on December 15, 1972 but prior to the time appellant was questioned by the grand jury in January, 1974 Mary's Candy Store moved locations, should fail. The trial court properly ruled that the change in the store's location after the arrest but prior to the grand jury hearing was irrelevant to the offense charged in the indictment. Appellant, as noted by the court, was on trial for allegedly falsely denying any knowledge about the gambling business and not for any gambling violation at the Candy Store (Tr. 137-139). Furthermore, the court stated "I am not going to let confusion be introduced into this case" when he ruled appellant's inquiries into the moving of the store irrelevant. That the raising of this clearly irrelevant matter would only tend to confuse the jury is evidenced by counsel for appellant's own confusion as to the date of the move. At various times during his initial raising of the issue he stated the move was made first two years after appellant's December 15, 1972 arrest, then a year and a half after the arrest, and finally approximately one year after the arrest (Tr. 85-87). In light of his own confusion, relevancy aside, the trial court's rulings on this point were proper.

Additionally appellant's claiming as error the court's limiting the cross-examination to matters only covered on direct (Br. 6; Tr. 126) (and thus the exclusion of testimoney involving runners) must likewise fall. It is well established that the trial court in the exercise of its

discretion may limit cross-examination to the scope of the direct. United States v. Dardi, 330 F.2d 316, 333 (2nd Cir. 1964), cert. den., 379 U.S. 845 (1964). See United States v. Hykel, 463 F.2d 1192, 1194 (3rd Cir. 1972).

The interruptions by the judge during summation, we submit were also warranted and in order. For example, the judge noted among other things that there had been no testimoney during the trial on certain subjects (Tr. 119, 2002); that counsel made reference to testimony in a prior trial (Tr. 190) and that he made repeated references to matters already ruled irrelevant (Tr. 193-194).

Finally, the excerpts quoted in appellant's brief are not truly representative of the judge's trial conduct and hence convey a distorted, one-sided impression. A review of the entire transcript, for example, would show that the judge, in fulfilling his duty to clarify ambiguities interrupted and questioned the two government witnesses on direct examination as well as on cross-examination (Tr. 62-68, 71-82, 88-98, 152-154). Also appellant fails to similarly note that the judge interrupted the prosecutor's opening argument. Thus, on balance the entire transcript reveals fair and unbiased conduct on the part of the judge. See United States v. Weiss, supra at 468; United States v. McCarthy, supra at 308.

II

THE TRIAL COURT'S SINGLE QUESTION DIRECTED TO THE DEFENDANT, UNDER THE CIRCUMSTANCES, DOES NOT REQUIRE REVERSAL

As stated supra, from the outset of this case, counsel for appellant had repeatedly brought to the district court's attention the fact that the location of Mary's Candy Store had changed between the time of appellant's arrest in the store on December 15, 1972 and the time of his appearance before the grand jury on January 16, 1974. On December 15, 1972 Mary's Candy Store was located at 432A Fourth Avenue in Brooklyn. When the police raid occurred on December 15, 1972 the warrant specifically designated 432A Fourth Avenue. All the documents seized, Gov't. Exh. 1-7, 9 (i.e. mutuel race horse policy betting slips denoting the names of the betters, the numbers played and the amount of the bets, football betting slips and a notebook with policy bets and amounts wagered (Tr. 76, 90-104))were taken either from the appellant personally (Gov't Exh. 2) or in his presence from the table he had been sitting at alone in the rear of the store. Officer Doherty concluded in his testimony, as noted supra in the statement, that the seized documents indicated that appellant was involved in a gambling operation and that his position was that of a controller who had more than one person working for him (Tr. 103).

When appellant was called to appear before the grand jury

on January 16, 1974 he was asked and correspondingly answered:

Q. Do you know what a runner is?

A. That runs in the mile track.

Q. In the relation to the gambling business.

A. I don't know the gambling business. (Emphasis added).

It was this latter response, a blanket denial of the gambling business, which formed the substantive count of perjury against the appellant. As the district judge noted in finding appellant's repeated attempts to inquire on cross-examination about the location of Mary's Candy Store at the time of appellant's grand jury appearance irrelevant, "You have to look at what the indictment says and the questions and answers." (Tr. 138). The judge further stated, "[the indictment does not] say "Did you know that gamblir was going on at Mary's Candy Store on 6th or 7th Avenue." (Tr. 138). The judge properly concluded that the appellant's attempt to cross-examine the arresting police officer as to where Mary's Candy Store was located at the time the appellant was brought to the grand jury was irrelevant to the issue in the case, which was, did the appellant ever engage in the gambling at any time and any place prior to his appearance so that his declaration could be found to be knowingly falsely made (Tr. 137-139). We concur with the district court's finding that where the store was located at that time of appellant's appearance before the grand jury was irrelevant to the case since the basis and

foundation of the offense charged lies in his knowledge of the gambling business, evidenced by the arrest of appellant in Mary's at 432A Fourth Street with the seized gambling documents on his person and in his presence.

With this background placing the issue of where the store was located at the time of appellant's grand jury appearance in its proper perspective, we note the circumstances in which appellant now claims plain error. On the direct examination of Doherty, the arresting officer, appellant's counsel objected generally to the identification by Doherty of the seized documents on the ground that they were found in 432A Fourth Avenue and not in 397 Fifth Avenue, near the location of Mary's Candy Store on the date of the grand jury appearance of appellant 4/ (Tr. 84). The judge then asked counsel, since he was objecting on that basis, when in fact the store was moved. Counsel first stated the move was made two-years after appellant's arrest, then he stated it was one and one-half years after the arrest and he finally surmised it was moved about a year before appellant was subpoened. The judge, prior to counsel's last incorrect

4/ Apparently counsel was attempting to argue that both the subpoena to appear before the grand jury and the seizure related solely to 397 Fifth Avenue and not 432A Fourth Avenue (Tr. 84).

approximation had inquired of counsel for appellant with the following result:

> THE COURT: Then the store was moved --correct me if I am wrong -- take it up with your client -- it must have been moved about a year thereafter [the arrest]; is that right?
>
> MR. BRACKLEY: About a year before being subpoenaed to the Grand Jury.
>
> THE COURT: No, no. Let me get the truth here so I understand it at least then all of us can understand it.
>
> Give us a date Mr. Sciannameo when Mary's Candy Store was moved. That is a simple solution. Do you know? You don't have to say anything --
>
> DEFENDANT SCIANNAMEO: It's about a year after the arrest, your Honor.
>
> THE COURT: That would be December 15, 1973?
>
> DEFENDANT SCIANNAMEO: Yes, around then.

It is this "questioning" in the presence of the jury that appellant now claims constitutes reversible plain error. We can not over emphasize enough that it was only through appellant's counsel's own repeated pressing of this issue and one in which the trial court had already stated it considered totally irrelevant to the case at bar, that the appellant was even called upon to make a response. In light of the fact that the date of the move, was sought by the judge in order to rule on appellant's initial objection to the identification of the seized documents,

that the government's case was not strengthened by the statement, and most importantly that the judge premised his request of appellant by stating to appellant "You don't have to say anything," we submit that there was no error here under the circumstances. Moreover, not only was appellant's response voluntary, but it clearly did not incriminate him under the charge in the indictment and was information that his counsel intended to furnish to the court. Finally, the date of the move, while perhaps unclear was not contested.

Following the exchange complained about here, appellant did not object, ask for cautionary instruction, or make a motion for a mistrial. At the end of the government's case appellant made a motion for dismissal but on other grounds. Now on appeal for the first time appellant contends it was "plain error" for the trial judge to question the appellant in the presence of the jury but fails to support his position with any authority. Assuming arguendo, there was error, it did not amount to "plain error." This Court has held that under Fed. R. Crim. P. 52(a), an error

at trial shall be disregarded on appeal if it "does not affect substantial rights." United States v. Mosca, 475 F.2d 1052, 1058-1059 (2nd Cir. 1973), cert. den., 93 S Ct. 3003, 3019 (1973). In Mosca this Court emphasized that "the required showing of prejudice would vary inversely with the degree to which the conduct of the trial has violated basic concepts of fair play." Id. at 1058. Here there was no prejudice suffered by appellant and he has alleged none. In light of this there can be no "plain error."[5/]

Lastly we note that appellant is merely entitled to a fair trial and not a perfect one. Lutwak v. United States, 344 U.S. 604, 619 (1952); United States v. Catino, 403 F.2d 491, 496 (2nd Cir. 1968), cert. den., sub. nom. Pagano v. United States, 394 U.S. 1003 (1969). Thus under the circumstances in the instant case, even assuming arguendo that there was mere error, since there was not even a reasonable possibility that the evidence complained of might have contributed to the conviction, any error was

---

5/ Appellant notes that prior to the selection of the jury, it was clear that appellant would not testify. In this regard we note from the outset that appellant requested an instruction on the failure to take the stand and the court gave an appropriate instruction (Tr. 240-241).

harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18, 24 (1967).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of conviction should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MARSHA KATZ,
CHARLES WEINTRABU,
Special Attorneys,
Brooklyn Strike Force.

ALAN J. SOBOL,
Attorney,
Department of Justice,
Washington, D. C. 20530.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief For Appellee has this day been mailed to counsel for appellant at the following address:

Albert J. Brackley, Esquire
186 Jouraleman Street
Brooklyn, New York 11201

DATED: May 23, 1975

Alan J. Sobol

ALAN J. SOBOL, Attorney
Appellate Section
Criminal Division
Department of Justice
Washington, D. C. 20530

May 23, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: Joseph Sciannameo v. United States
No. 75-1050

Dear Mr. Fusaro:

Enclosed for filing are twenty-five (25) copies of the Brief for Appellee. A Certificate of Service is attached to the Brief.

Copies have this day been mailed to counsel for appellants.

Sincerely,

ALAN J. SOBOL, Attorney
Appellate Section
Criminal Division

c/o T. George Gilinsky
Ben Franklin Station
P. O. Box 899
Washington, D. C. 20044

CC: Albert J. Brackley, Esquire
186 Jouralemon Street,
Brooklyn, New York 11201